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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| FRANK LIMA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CITY OF LOS ANGELES,<br><br>Defendant and Appellant. | B202029<br><br>(Los Angeles County<br>Super. Ct. No. BC353261) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Tricia Ann Bigelow, Judge. Affirmed.

Rockard J. Delgadillo, City Attorney, and Paul L. Winnemore, Deputy City Attorney, for Defendant and Appellant.

Law Offices of Gregory W. Smith, Gregory W. Smith; Benedon & Serlin, Douglas G. Benedon and Gerald M. Serlin for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant, the City of Los Angeles, appeals from a judgment following a jury verdict in favor of plaintiff, Frank Lima. The judgment is premised on plaintiff's Department of Fair Employment and Housing Act retaliation claim. We affirm the judgment.

## II. BACKGROUND

The Los Angeles City Fire Department (department) hierarchy includes, in descending order of rank: the fire chief; five deputy chiefs; assistant chiefs; battalion chiefs; captain IIs; captain Is; engineers; inspectors IIs; inspector Is; apparatus operators; firefighter IIIs; firefighter IIs; and firefighter Is. The chief officers (fire chief, deputy chief, assistant chief, battalion chief) are represented by the Chief Officer's Association bargaining unit. The remaining ranks are represented by the United Firefighters of Los Angeles City bargaining unit. Plaintiff is a captain II with the department. Plaintiff sued the department on May 31, 2006, for gender and sex discrimination (first cause of action) and retaliation (second cause of action) in violation of the Fair Employment and Housing Act. (Gov. Code, § 12940 et seq.) With plaintiff's consent, the trial court summarily adjudicated his discrimination claim. In his second cause of action for retaliation, plaintiff alleged he was retaliated against for opposing an unofficial department policy designed to solve a recruiting and retention problem by giving preferential treatment to firefighters who are women. The trial court denied summary adjudication as to that claim. The trial court noted, "[The Fair Employment and Housing Act] disallows the *preferential*—as well as detrimental—treatment of protected classes."

Plaintiff's retaliation cause of action went to trial before a jury on May 22, 2007. The jury specifically found: plaintiff "oppose[d] being told to give preferential treatment to female fire fighters"; defendant reprimanded plaintiff for his conduct in a July 19,

2004 training drill, denied him a position as captain of the urban search and rescue team, imposed a 30-day suspension for an incident of which plaintiff had no knowledge, "treat[ed] him differently regarding his time off," and "treat[ed] him differently during [a] tanker fire"; "[plaintiff's] opposition to being told to give preferential treatment to female fire fighters [was] a motivating reason for [the foregoing conduct by defendant]"; defendant's retaliatory conduct was "a substantial factor in causing [plaintiff] harm"; and plaintiff was damaged in the amount of $3.75 million dollars ($790,000 in future economic, $2 million in past noneconomic, and $960,000 in future noneconomic losses). The trial court denied defendant's judgment notwithstanding the verdict and new trial motions. This appeal followed.

## III. DISCUSSION

### A. The Retaliation Cause of Action

Government Code section 12940, subdivision (h) is the statutory basis for a Fair Employment and Housing Act retaliation cause of action. (*Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1161-1162; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1035.) Government Code section 12940, subdivision (h) states in part: "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: [¶] . . . [¶] . . . For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

A Fair Employment and Housing Act retaliation claim is subject, at trial, to the three-stage burden-shifting test set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-805. (*Yanowitz v. L'Oreal USA, Inc., supra*, 36 Cal.4th at p. 1042;

*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 356.) First, the plaintiff must establish a prima facie case of retaliation: the employee engaged in a protected activity; the employer subjected the employee to an adverse employment action; and there was a causal link between the protected activity and the adverse action. (*Yanowitz v. L'Oreal USA, Inc., supra,* 36 Cal.4th at p. 1042; *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1252.) Second, once the employee establishes a prima facie case, the burden shifts to the employer to rebut the presumption of retaliation. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355-356; *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 112.) If the employer meets this burden, if it offers a facially sufficient lawful reason for the challenged action, the presumption of retaliation disappears. (*Yanowitz v. L'Oreal USA, Inc., supra,* 36 Cal.4th at p. 1042; *Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 356; *Reeves v. Safeway Stores, Inc., supra,* 121 Cal.App.4th at p. 112.) Third, once the defendant shows a non-retaliatory reason for its action, the burden shifts back to the plaintiff to attack the employer's proffered reason as pretext for retaliation or to offer evidence of retaliatory motive. (*Guz v. v, Bechtel National, Inc., supra,* 24 Cal.4th at pp. 355-356; *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67-68.) The plaintiff must show by a preponderance of the evidence that the adverse employment action was in fact the result of an illegal motive—in this case retaliation—rather than other causes. (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 356; *Reeves v. Safeway Stores, Inc., supra*, 121 Cal.App.4th at p. 112.)

In the present case, plaintiff claimed he was retaliated against for engaging in protected activity in that he opposed an unofficial department policy to preferentially treat female firefighters. That unofficial policy violates the California Constitution. The California Constitution prohibits a public employer from giving preferential treatment to an individual on the basis of gender. (Cal. Const., art. I, § 31; *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 541-542; *C&C Construction, Inc. v. Sacramento Mun. Utility Dist.* (2004) 122 Cal.App.4th 284, 291.) The unofficial policy also violates the Fair Employment and Housing Act. Decisional authority demonstrates

the Fair Employment and Housing Act prohibits preferential treatment of female employees on the basis of sex. (See *Broderick v. Ruder* (D.D.C. 1988) 685 F.Supp. 1269, 1278-1279; *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 459-460, 463-466; *Department of Corrections v. State Personnel Bd. (Wallace)* (1997) 59 Cal.App.4th 131, 143 & fn. 1; *Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1629-1630; *Nicolo v. Citibank New York State, N.A.* (N.Y.Sup. 1990) 554 N.Y.S.2d 795, 799.) Further, as our Supreme Court has explained: "[A]n employee's conduct may constitute protected activity for purposes of the antiretaliation provision of the [Fair Employment and Housing Act] not only when the employee opposes conduct that ultimately is determined to be unlawfully discriminatory under the [Fair Employment and Housing Act], but also when the employee opposes conduct that the employee reasonably and in good faith believes to be discriminatory, whether or not the challenged conduct is ultimately found to violate the [Fair Employment and Housing Act]. It is well established that a retaliation claim may be brought by an employee who has complained of or opposed conduct that the employee reasonably believes to be discriminatory, even when a court later determines the conduct was not actually prohibited by the [Fair Employment and Housing Act]. (See, e.g., *Miller v. Department of Corrections, supra,* 36 Cal.4th at p. 473; *Flait v. North American Watch Corp.* [(1992)] 3 Cal.App.4th [467,] 477; *Moyo v. Gomez* (9th Cir. 1994) 40 F.3d 982, 985; *Gifford v. Atchison, Topeka & Santa Fe Ry. Co.* (9th Cir. 1982) 685 F.2d 1149, 1157.)" (*Yanowitz v. L'Oreal USA Inc., supra,* 36 Cal.4th at p. 1043, fn. omitted.) Defendant does not contend plaintiff did not reasonably believe it was discriminatory to give preferential treatment to firefighters who were women. Plaintiff engaged in activity protected under the Fair Employment and Housing Act when he expressed opposition to the department's preferential treatment policy.

Two points warrant emphasis. First, this is a case where the department's official policy is that women and men are treated equally. This is not a case where plaintiff disagreed with the department's official physical fitness and proficiency requirements

and proceeded to treat women differently. Nor is this a case where plaintiff complained about the department's official physical fitness and proficiency policies. Rather, this is a case where there is evidence plaintiff disagreed with the department's practice of refusing to enforce its nondiscrimination policy. This is a case where there is evidence plaintiff received orders from superiors to treat women preferentially and, when he objected to the policy, he was the subject of retaliation. Second, defendant presented evidence it has no such unofficial policy. Because the jury believed plaintiff's version of the testimony, our discussion of the facts proceeds on the basis such an unlawful policy exists.

### B. Judgment Notwithstanding the Verdict

#### 1. Standard of review and evidence

Defendant argues it was error to deny its judgment notwithstanding the verdict motion because there was no substantial evidence plaintiff suffered any adverse employment action. Defendant further asserts there was no substantial evidence any action was motivated by an unlawful retaliatory intent. We disagree. Our review of the record discloses substantial evidence and reasonable inferences therefrom in support of the judgment.

The Supreme Court has described the trial court's power to grant a judgment notwithstanding the verdict as follows: "The trial judge's power to grant a judgment notwithstanding the verdict is identical to his power to grant a directed verdict. [Citations.] The trial judge cannot weigh the evidence [citation], or judge the credibility of witnesses. [Citation.] If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. [Citations.] 'A motion for judgment notwithstanding the verdict . . . may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in

support of the verdict, the motion should be denied.' [Citation.]" (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110; accord, *Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, 877-878.) We are required to view the evidence in the light most favorable to the judgment. (*Hauter v. Zogarts, supra,* 14 Cal.3d at p. 111; *Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154, 159.)

Viewed in the light most favorable to the verdict, the evidence established the following. Plaintiff grew up in Lincoln Heights and wanted to be a firefighter since he was 10 years old. Plaintiff graduated as the top recruit in his firefighter class in 1992. He was the youngest member of that group, only 19 years of age. He rose rapidly through the ranks. He was promoted at age 24 or 25 to apparatus operator. After three or four years, he was promoted to fire captain I. Plaintiff was the youngest captain I of which he was aware. He subsequently scored in the "top 10" on the captain II examination and was promoted the first day the list came out. Plaintiff was the youngest captain II in the department.

Additionally, plaintiff had been a certified member of the urban search and rescue team from its inception, following the 1993 Northridge earthquake. He had undergone extensive training, including a five-day, 40-hour, entry level rescue course. He had deployed to the World Trade Center site in New York City following the events of September 11, 2001. He had responded to Salt Lake City during the 2002 Olympic games. He had traveled to New Orleans in the aftermath of Hurricane Katrina. Captain Donald Reyes had encouraged plaintiff to join the urban search and rescue team. Captain Reyes testified, "[Plaintiff] was a bullet. He was an outstanding firefighter"; he was "real conscientious and really takes the time to learn [his] job really well"; his abilities were excellent and he was a very good leader.

Plaintiff was 34 years old at the time of trial. He expected to work until he was 65. He loved the department. He wanted to become a battalion chief, then an assistant chief, and possibly a deputy chief.

The next promotional step in plaintiff's career would have been from captain II to battalion chief. The fire chief is the appointing authority for promotions to battalion chief. There was a three-part process for promotions, including from captain II to battalion chief: a written test; a civil service interview conducted by people outside the department—which results in a civil service list; and an internal interview. In the case of a battalion chief or assistant chief position, the interview would be before at least three and as many as all five deputy chiefs, as determined by the fire chief. The internal interview is the final step in the selection process and "a critical portion" of the test. The third and final step established the promotabiliy list. Battalion Chief Daryl C. Arbuthnott explained: "All of the promotional process with the exception of [a pay grade advance] require that you file an application with the civil service personnel department, and once you complete that there is a written examination, they schedule that, and after the written examination you participate in an interview, oral interview portion. Once that's completed a list is established. That civil service list is established and then turned over certified by their personnel department manager, and then the department's general manager and then they publish a list, a certified list." Battalion Chief Arbuthnott further testified: "The three whole scoring process is an internal selection interview process whereby the department does its own selecting after a civil service exam list has been established. So there is a civil service process and once they have established a certified list it gets turned over to the fire department to actually do an internal interview process and then we actually select or promote from that list." At the chief officer level (fire chief, deputy chief, battalion chief) there is no minimum passing score; the fire chief can appoint even the lowest scoring individual. From captain I to captain II is a pay grade advance, not a promotion. Battalion Chief Arbuthnott testified no individual deputy chief could have denied plaintiff a promotion to battalion chief because the fire chief is the appointing authority. A firefighter can request that a member of the interview panel be removed, and the department "in the past has granted" such requests. Battalion Chief

Arbuthnott knew of a few assistant chiefs and a number of battalion chiefs who had been promoted despite having been disciplined in the past.

Plaintiff received high ratings within the department from both subordinates and superiors. Plaintiff received an overall excellent rating on his December 2002 performance evaluation. Platoon Commander Thomas Kephart, who had supervised plaintiff for eight months, described plaintiff as: "a solid leader and supervisor" with "an extremely high level of enthusiasm, competency and work ethic"; a "knowledgeable, capable and well-rounded officer"; and "an excellent leader and supervisor."

Plaintiff also received an overall excellent rating on his December 2003 performance evaluation, which covered the period from January 29, 2002, through January 28, 2003. Plaintiff was disciplined in 2003 for allowing his platoon to briefly attend a bachelorette party for one of his crew's fiancé while they were on duty. Plaintiff and his members "participated in a game involving an inappropriate adult toy," and left their fire truck parked without a security detail. Deputy Chief Mario D. Rueda testified that plaintiff, who was remorseful, received a reprimand. Plaintiff's December 2003 evaluation was the last one he received prior to the July 19, 2004 training drill—which event led, ultimately, to the present lawsuit. Plaintiff was rated "outstanding" in the areas of initiative, decisiveness, development of subordinates, and planning and training, and excellent or excellent plus in all other areas.

Just prior to the July 19, 2004 training drill, on May 15, 2004, plaintiff presented a training session for which he was commended. Battalion Chief Arbuthnott wrote: "This letter is in appreciation for your dedication and commitment to this organization in that on May 15, 2004, you developed, planned, trained and presented an outstanding [training session]. The training was extremely practical and all feedback received was consistently positive. In addition, you delegated tasks and caused members of your command to participate in the development and teaching phase of this training. [¶] It is with great pride that I officially recognize you and the members of your command for their display

of dedication, professionalism and commitment in making this organization a premier professional fire department. Again, congratulations on an outstanding job!"

At trial, Battalion Chief Arbuthnott testified. Battalion Chief Arbuthnott had observed plaintiff training firefighters and had received positive feedback from others. Battalion Chief Arbuthnott praised plaintiff as a very efficient and effective strong officer, an outstanding trainer, and an asset to the department with respect to training. Battalion Chief Arbuthnott had personally observed plaintiff. Based on those personal observations, Battalion Chief Arbuthnott testified plaintiff: was constantly seeking opportunities to develop subordinates; spent numerous hours training them; was an enthusiastic hands-on trainer; was approachable and accepting of criticism; demonstrated a willingness to assist the department with projects; put out a very good training program; and was a very loyal employee. According to Battalion Chief Arbuthnott, "[Plaintiff had] demonstrated the ability to communicate clear, deliberate decisions and be decisive in commanding his members." Captain Donald Reyes also praised plaintiff. Captain Reyes described plaintiff as "a bullet," meaning "an outstanding firefighter," sharp, conscientious, with "excellent" abilities.

Plaintiff's experience in the department changed after he disagreed with and refused to follow an unofficial department policy to give preferential treatment to women. The department had an official non-discrimination policy. But there was testimony the department was under pressure to recruit women to be firefighters. As a result, the testimony indicated, in the academy and as part of the regular training process, women were passed through even though they were unqualified. There was testimony some women in the department who were firefighters could not execute necessary skills. At least three of the five deputy fire chiefs in the department had directed subordinates to treat women differently and to not eliminate them from the program or fail them as part of the training process. There was testimony Deputy Chiefs Rueda, Andrew P. Fox, and Emile Mack had given such orders. Further, there was testimony one battalion chief, Tony M. Varela, had given such orders.

Captain John Cappon testified as to a meeting with Deputy Chief Rueda on September 19, 2005. Captain Cappon set up the meeting to discuss a female firefighter under his command who claimed she had been injured during a drill. Captain Cappon stated, "[T]he implication was that she was singled out and excessively trained." According to Captain Cappon, Deputy Chief Rueda stated the department was having a hard time retaining women as firefighters, so they had to be treated differently. Deputy Chief Rueda essentially denied making that statement.

Captain Scott Campos, a captain II, had been a drill master at the department's training academy for two years, 2004 and 2005. Captain Campos testified that when he was a drilling instructor he had several conversations with Chief Mack about training women firefighters. Captain Campos stated, "I've had several conversations with Chief Mack regarding the training status of females in the academy and I was directed to overlook any deficiencies because I was told that a 100 percent of them were going to pass and go to the field regardless of their ability." At another point, Captain Campos testified he had been ordered several times "to pass a female" but he did not follow the orders. Both Deputy Chief Mack and Battalion Chief Varela had given Captain Campos direct orders to that effect. Captain Campos testified: "I was directed on many cases to pass females. In one I was given a direct order to pass this female on a ladder evolution that she couldn't possibly have passed, and I was given a direct order twice. When I refused I basically stated if you put it in writing I will honor his direct request because of the fact I'm subordinate to him. When it wasn't put in writing I refused and was relieved of my command [by Battalion Chief Varela]." Defendant did not call Deputy Chief Mack or Battalion Chief Varela to testify. Captain Campos further testified that at some point a "ladder evolution" was eliminated as a requirement because women could not pass it. Captain Campos said that during the two years he acted as a drill master he recommended termination of 95 percent of women who could not perform the ladder skill—"And in all cases it was overlooked and they were sent to the field." Captain Campos did not participate in the management decision to eliminate the task.

On June 19, 2004, plaintiff, together with Captain Armando A. Jaimes, a captain I, conducted a training drill. During the drill, a firefighter, who is a woman, was required to "throw" a ladder. Plaintiff explained, "Throwing a ladder is just the complete evolution from picking it up off the ground or taking it off of a fire apparatus till the time it's against the wall or against a roof and you say my drill is complete." The female firefighter struggled with the task, but managed to complete it. Later, she claimed plaintiff had singled her out and harassed her and she had been physically injured during the drill. She went to a hospital for treatment of her injury.

On June 24, 2004, plaintiff's supervisor, Battalion Chief Arbuthnott, received a telephone call from Assistant Chief Roxanne V. Bercik. Assistant Chief Bercik told Battalion Chief Arbuthnott there had been "an alleged hostile work environment or training environment" that occurred under plaintiff's supervision. Battalion Chief Arbuthnott conducted an informal inquiry.

On June 27, 2004, Battalion Chief Arbuthnott counseled plaintiff. The counseling involved plaintiff's drilling techniques and comments or complaints received from his subordinates. Battalion Chief Arbuthnott was concerned about plaintiff's well-being. Battalion Chief Arbuthnott did not want plaintiff to develop a bad reputation.

Also on June 27, 2004, Battalion Chief Arbuthnott advised Assistant Chief Roy T. Kozaki of the allegations against plaintiff. Assistant Chief Kozaki was Battalion Chief Arbuthnott's commanding officer. In a July 1, 2004, memorandum to Assistant Chief Kozaki, Battalion Chief Arbuthnott reported the results of the initial inquiry concerning plaintiff's alleged hostile work and training environment. Battalion Chief Arbuthnott concluded plaintiff did not intend to expose or embarrass the female firefighter. Battalion Chief Arbuthnott recommended that no corrective action be taken at that time. Battalion Chief Arbuthnott further recommended, " [Plaintiff's] personnel packet be reviewed for similar occurrences, and if so, that corrective action be taken consistent with the Department's past practice."

Assistant Chief Kozaki directed Battalion Chief Arbuthnott to conduct a second investigation. In an August 2, 2004 memorandum to Assistant Chief Kozaki, Battalion Chief Arbuthnott reported the results of the investigation. Battalion Chief Arbuthnott noted, among other things, that 37 firefighters had submitted letters concerning the June 19, 2004 training drill and noted, "[M]ost of the members supported both captain[s'] efforts saying they were some of the best trainers they have worked for." Battalion Chief Arbuthnott recommended that plaintiff receive a reprimand. Further, Battalion Chief Arbuthnott recommended, as he had on June 27, 2006, "[Plaintiff's] personal file [should] be reviewed for similar occurrences, and if so, that further corrective action be taken commensurate with Department Policy."

Following further investigation, and after consulting with Assistant Chief Kozaki, Battalion Chief Arbuthnott issued a reprimand asserting plaintiff had failed to take appropriate measures to ensure the firefighter's safety and took unnecessary risks when conducting the training drill. Plaintiff testified that as reflected in union and department policy, a reprimand is discipline.

Plaintiff testified he had never been accused of "over[]drilling" in the past. Prior to June 2004, plaintiff had been under Battalion Chief Arbuthnott's supervision for roughly eight months. During that time, plaintiff had never been reprimanded for his drilling practices. Nor had plaintiff been counseled concerning his training drills. Plaintiff filed a "nonconcurrence" to the reprimand.

On October 12, 2004, Deputy Chief Rueda concluded: "I do not believe that the administration of discipline will result in a significant change in behavior or a greater understanding of the issues by Captain Lima. I do have serious concerns concerning his understanding the issues as he has non-concurred with his Reprimand." Deputy Chief Rueda recommended that plaintiff's conduct be reviewed for further action. Just prior to Christmas 2004, plaintiff was served with a 6-day suspension. Plaintiff challenged the suspension.

A hearing pursuant to *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 206, was held on January 24, 2005. Deputy Chief Fox, then Commander of Operations, conducted the hearing. Plaintiff was represented by Steven J. Tufts, president of the United Firefighters of Los Angeles. During the hearing, Deputy Chief Fox told plaintiff: "Frank, you know you got to treat women differently. You can't . . . put them in a position where they might fail. They are under a microscope. . . . I have so many problems right now with females on this department. I have problems with [D.L.] I have problems with [B.L.] I have problems with the female rookie at fire station 61[] and now I have your problem." Plaintiff protested, as did Mr. Tufts. Plaintiff told Deputy Chief Fox, "[L]ook, I treat everybody the same and I always have and I always will, and everything that you preach the good officers to do is to treat everybody the same." Deputy Chief Fox responded, "[Y]ou know how hard it is to recruit a decent female in this job and I'm going to have to make an organizational decision here . . . in regards to your discipline." Deputy Chief Fox said: "Frank, I could say that this drill I will drop the charges here. But . . . I got to give you something here. I got all these other cases going on with the females so I'm going to reduce your suspension [from six days] to two days off." Deputy Chief Fox also said plaintiff had "a bright future." Deputy Chief Fox told plaintiff, "[I] want[] to pin gold badges on guys like [you]." At trial, Deputy Chief Fox denied telling plaintiff to give preferential treatment to women.

Mr. Tufts, who was present at the *Skelly* hearing, testified, "[T]here was a discussion—I don't remember the exact verbiage but the conversation basically [was] women are different than men and—basically it came down to treat them differently." Mr. Tufts "had a problem" with the discussion. Mr. Tufts explained to Chief Fox: "[U]nless [plaintiff] is taught, or that's the policy of the department, they are going to treat females differently, he is to treat everybody the same. And my position that's what we demand, everybody is treated the same, no matter sex or anything else." According to Mr. Tufts, "[T]he message was that [plaintiff] should have known to treat females differently than the males." Mr. Tufts was asked, "Do you recall [Chief] Fox . . . saying I

have to make an organizational decision, using words like that?" Mr. Tufts responded, "He said that quite often."

On February 3, 2005, Deputy Chief Fox recommended to Fire Chief William R. Bamattre that the proposed 6-day suspension be reduced to 2 days. Deputy Chief Fox's memorandum recommending disciplinary action stated: "On June 24, 2004, Battalion Chief Daryl C. Arbuthnott was notified that an act of potential harassment had taken place between [plaintiff] and [a female firefighter]. Captain Lima . . . was alleged to have placed [the firefighter] in a position prompting the possibility of injury, and that when confronted with the situation, failed to act to prevent it from happening. [¶] The alleged act occurred on June 19, 2004, during a weekend training exercise where [the female firefighter] sustained a significant injury to her neck and shoulder while raising a 35 [foot] extension ladder as the top person. The allegations indicated that Captain Lima took unnecessary risk when he required his crew members to perform a two-person 35 [foot] extension ladder evolution while members were in full turnouts and required to wear their breathing apparatus and face piece connected on air. [¶] Captain Lima placed all the firefighters that participated in the exercise at great risk. While [the female firefighter] was performing her evolution on the ladder, Captain Lima failed to assist her and stopped others from helping her when it was evident that she could not raise the ladder. His actions or lack of, contributed greatly to the injuries sustained by [the firefighter]. . . . [¶] . . . [¶] . . . During his [*Skelly*] hearing on January 24, 2005, Captain Lima . . . explained the circumstances surrounding the incident. He stated he did not intend to hurt anyone. Captain Lima accepted responsibility for the incident. He felt he has learned from the experience and would not let it ever happen again. Therefore, the proposed six-working-day suspension was reduced to two working days." On February 4, 2005, Fire Chief Bamattre approved Deputy Chief Fox's recommended 2-day suspension.

Plaintiff appealed the 2-day suspension to the Board of Rights. The Board of Rights was convened on February 18, 2005. The Board of Rights panel consisted of

three battalion chiefs—M. A. Bowman, the chairperson, P.L. Engel, and T.R. Brennan. The Board of Rights issued its findings on May 13, 2005. It found plaintiff guilty of one charge—failure to come to the aid of a firefighter—and not guilty of the other—conducting an excessive drill. The board concluded plaintiff "failed to use good judgement [*sic*] during the 35 [foot] ladder evolution to avoid injury to" the firefighter. The board further found plaintiff, without malice, had "failed to utilize precautionary measures" he had initiated. The 2-day suspension was reduced to a reprimand. Stated differently, the Board of Rights allowed Battalion Chief Arbuthnott's original reprimand to stand. Plaintiff testified, "[T]he reprimand . . . demoralized me and . . . took the wind out of my sails"; it diminished his desire to train firefighters. In comparison, Captain Jaimes, a captain I, who had initiated the July 19, 2004 training drill with plaintiff, was not disciplined at all.

Plaintiff testified that after he voiced his opposition to the department's unofficial policy regarding female firefighters, he was treated by his superiors in a manner that hampered his ability to rise within the department. Plaintiff testified, "My life in the fire department sure did change after that." Plaintiff's performance evaluations suddenly were less favorable. In the first performance evaluation after plaintiff engaged in the protected activity, expressing disagreement with the department's preferential treatment of women in January 2005, Battalion Chief Arbuthnott rated plaintiff only satisfactory in all but one category. Battalion Chief Arbuthnott did give plaintiff an overall rating of excellent. Plaintiff testified that Battalion Chief Arbuthnott received criticism for the excellent rating: "[H]e had mentioned he has taken a lot of heat from Chief Mario Rueda for giving me an overall excellent. . . ." Deputy Chief Rueda and Assistant Chief Richard Warford did not concur with the overall excellent rating. They wanted Battalion Chief Arbuthnott to downgrade the evaluation. Deputy Chief Rueda wrote: "Captain Lima is a natural leader, unfortunately the immaturity demonstrated has caused me great concern over his ability to manage a Task Force Fire Station. During this rating period, Captain Lima has been placed on notice regarding his [pay grade advance] as a result of poor

decision making. I believe Battalion Chief Arbuthnott has done Captain Lima a disservice in rating him Excellent." At trial, Deputy Chief Rueda testified, "I was concerned about Captain Lima's immaturity." (RT 8:1210)~

Plaintiff's next evaluation covered the period from January 12, 2006, to January 12, 2007. Battalion Chief Chris Logan evaluated plaintiff. Plaintiff had been under Battalion Chief Logan's command for two years. In 19 separate categories, plaintiff received: 2 outstanding ratings; 5 excellent ratings; 11 satisfactory ratings; and 1 satisfactory plus rating. Battalion Chief Logan rated plaintiff's performance satisfactory plus overall.

In the summer of 2005, several months after plaintiff, in January 2005, voiced his opposition to the department's illegal policy, there was an opening for captain of the urban search and rescue team. This was a captain II position and, as such, would have been a lateral move for plaintiff. But it was also, as discussed below, a stepping stone to the position of battalion chief. As noted above, plaintiff had been a member of the urban search and rescue team for more than 10 years. He had deployed several times to locations outside California. Plaintiff "really wanted" the captain position.

The urban search and rescue team was under the Bureau of Emergency Services. Deputy Chief Rueda was in charge of that bureau. Plaintiff was one of several captains who interviewed for the job. Plaintiff's interview panel consisted of Battalion Chiefs Edward Bushman, Donald Manning, and Gregory West. Plaintiff testified at trial that he had recently learned he scored the lowest out of all the captains on this interview. Plaintiff felt his score was not at all reflective of his interview. He testified, "I believe I gave a great interview."

A department member, identified only as Captain Elder, and not plaintiff, was given the urban search and rescue captain position. Captain Elder was not certified in urban search and rescue. Captain Reyes, who had encouraged plaintiff to join the urban search and rescue team in 1993, worked "very closely" with Captain Elder. Their close working relationship had developed after Captain Elder became the urban search and

rescue team captain. Captain Elder had not been a member of the team prior to his appointment. He had not trained to be on the team. Captain Elder had never taken any of the urban search and rescue courses. Captain Reyes testified, "I had to train him in the sense of learning a lot of the things about the job that he would need to know to try to be able to help us." When Captain Elder began his command with the urban search and rescue team, he did not have the ability to schedule and direct training activities, a job requirement. He did not have the training that would allow him to respond to technical rescue incidents, another job requirement. Captain Reyes testified plaintiff, on the other hand, had those abilities and was better qualified in 2005 to be the urban search and rescue team captain than was Captain Elder.

The urban search and rescue team captain position was a stepping-stone to battalion chief. A number of people had been promoted from captain of the urban search and rescue team to battalion chief. Captain Reyes testified he knew of at least five captain IIs with the urban search and rescue team who had promoted to battalion chief. At the time of trial, Captain Elder was about to promote to battalion chief; he had finished at the top of the battalion chief's list.

On August 18, 2005—seven months after plaintiff's *Skelly* hearing before Deputy Chief Fox—the department issued a 30-day suspension notice. The notice was signed by Deputy Chief Fox as Commander of Operations. August 18 was plaintiff's "regular day off." The following day, Friday, August 19, 2005, plaintiff received a telephone call at home from Mr. Tufts, the union president. Mr. Tufts said plaintiff was going to be suspended for 30 days. Plaintiff was told he was being denied any vacation time off, any time trades, or any type of approved time off. Plaintiff testified, "I had never heard of [being denied approved time off in this manner]." Plaintiff called in sick on August 23. Plaintiff's asthma—a result of responding to the World Trade Center site—had kicked up. Two union officials called plaintiff at home and said Battalion Chief Fox was angry. Battalion Chief Fox was angry because plaintiff had called in sick. On August 24, plaintiff's regular day off, Battalion Chief John Duca came to plaintiff's house to do a

"welfare check." Plaintiff testified such visit was unprecedented. On August 31, 2005, plaintiff was deployed to Hurricane Katrina. Plaintiff received the 30-day suspension notice on September 22, 2005, following his return from deployment. Plaintiff testified: "A 30-day suspension is the maximum that the operations commander could lay on you before it goes to a Board of Rights and a bigger focus is laid on. So that's the maximum that he could give you without going to a board of rights." (The operations commander is a deputy chief who is the second ranking person in the department.)

The suspension notice was issued in connection with an incident of which plaintiff had no knowledge. The parties referred to this as the "Libby" incident. At the time of the incident, in September 2003, plaintiff was a captain II at a fire station in Westwood. Firefighter John H. Libby, an engineer, was under plaintiff's command. There were three captain IIs and three battalion chiefs assigned to the Westwood station. Battalion Chief John Drake was on his last shift at the station. Some of the crew, as a prank, took some "pretty inappropriate pictures" of firefighter Libby. Plaintiff knew nothing about the incident until after he was served with the suspension notice—22 months after the photographs were taken. Plaintiff had no knowledge they had been taken. He was not at the station at the time they were taken. Until he was notified of the proposed discipline, no one told him the photographs existed. The department received copies of the photographs on June 22, 2005. Some internal affairs officers came to plaintiff's station in Eagle Rock and told him they needed to interview him because he had been a captain in Westwood when the photographs were taken. The internal affairs officers spoke to plaintiff for three minutes. Plaintiff told them he had no knowledge of the pictures and he was not there when they were taken. And then plaintiff received the 30-day suspension notice from Deputy Chief Fox. A captain who participated in the photograph-taking received a 30-day suspension. Firefighter Libby was also given a 30-day suspension. On September 26, 2005, plaintiff requested a Board of Rights hearing.

The department's investigation confirmed that plaintiff was not present and did not participate in the Libby incident. In an August 17, 2005 memorandum, Battalion

Chief Craig A. Yoder summarized the investigation into the matter: "The investigation revealed that Captain Lima was out of quarters at the time and did not personally participate in this event. However, the horseplay and inappropriate conduct of [Libby's supervisor and plaintiff's subordinate, a captain I] condoning this act, along with [the captain I's] participating in taking the photographs, demonstrates the lack of enforcement of discipline and the promotion and maintenance of efficiency of Captain Lima's command. [¶] Under Captain Lima's command, the requirement of his subordinates to comply with all orders, regulations, practices, and procedures of the Department was not upheld and clearly affected the interest and welfare of the Department."

Firefighter Michael Mcosker, an engineer, was present when plaintiff and Deputy Chief Fox discussed the 30-day suspension. During that meeting, plaintiff expressed his dissatisfaction with the proposed discipline. Firefighter Mcosker described plaintiff's frustration with the discipline: "[Plaintiff] thought, number one, it was excessive given the facts that were alleged by the employer, and also he felt that . . . it was an attempt to get even . . . or get back at him for some . . . discipline that maybe had been resolved not to management's satisfaction in the past. [¶] . . . [¶] . . . [Plaintiff] had been disciplined—a member had become injured at a drill and there was some indication that [plaintiff] didn't properly supervise the drill. [¶] . . . [¶] . . . [Plaintiff] expressed a belief that management was getting back at him due to his expressed intent to supervise all members of the fire department equally regardless of gender." Firefighter Mcosker testified Deputy Chief Fox responded to plaintiff's views as follows: "[M]y recollection is that [Deputy Chief Fox] indicated there were pressures being brought to bear on him and the department that—you know, that were a reality, a reality that might be unpleasant but [he] was going to have to do what he was going to do and he really didn't listen to [plaintiff's] presentation and [his] mitigation that he was offering of the charges." Engineer Mcosker further testified: "At one point [plaintiff] became so frustrated he said, you know it looks like I'll never get a fair shake [in the department]. Some day I'll have to go outside and people that are impartial will have to hear this at some point."

Firefighter Mcosker described Deputy Chief Fox's response: "Chief Fox seemed a little amused by that, kind of leaned back, and kind indicated towards me with his hand and said, Mike can tell you—something to the effect of Mike can tell you I don't mind depositions, I do them all the time."

Shortly after their return from New Orleans, in late September 2005, the urban search and rescue team received a call to respond to Hurricane Rita. This was eight months after plaintiff expressed disagreement with the practice of treating women preferentially. Plaintiff testified, ". . . I went out to the [urban search and rescue] unit out in the valley and that's when they pulled me off of the team that afternoon." Plaintiff spoke personally with both Deputy Chief Fox and Deputy Chief Rueda. Plaintiff described what happened: "[N]either one of them could own up to it as far as Chief Fox was saying, no, Chief Rueda said you can't go. You have some discipline problems coming up. You have 30 days off. And then Chief Rueda would say, no, Chief Fox said you can't go. I got a circle of back and forth. Never got a straight answer." Chief Fox claimed Chief Rueda had made the decision plaintiff could not accompany the search and rescue team to the Hurricane Rita incident. Chief Rueda claimed Chief Fox had made the decision. This was the first time plaintiff had ever failed to deploy with the urban search and rescue team.

Sometime in the fall of 2005, plaintiff and his crew responded to an overturned tanker fire on a freeway. Nine thousand gallons of gas were burning. Plaintiff's company was the first on the scene. It was raining very hard; pouring at times. Plaintiff testified: "[W]e did an excellent job in the pouring rain. They kept us on scene for hours [with] no [relief], for in my experience of 15 years, no reason necessary." Contrary to department custom and practice, plaintiff and his crew were ordered to stay at the freeway location to the end; they were the first to arrive and among the last to leave. They had arrived on the scene around 1 a.m. and did not return to the station until lunchtime. Several platoons arrived later and left earlier. While others took cover from

the pouring rain, Battalion Chief Logan ordered plaintiff, personally, to stand outside and "man" the hose line.

In September 2006—one year after plaintiff first voiced opposition to the department's preferential treatment policy—he requested a transfer to a fire station in Pacific Palisades. Plaintiff explained the department's transfer policy: "If a vacancy arises at another fire station and it's just a normal fire station where there is no special certification needed, like for example like a hazardous materials station or a[n] [urban search and rescue] station, but just a regular fire fighting station, then it goes strictly by seniority." At first, a firefighter who did not have seniority over plaintiff was granted the transfer. Plaintiff called Chief Rueda's bureau and was told, "[I]f you . . . want to know why you didn't get the transfer, put it in writing." Plaintiff contacted his union's president, who went straight to the fire chief. Immediately thereafter, plaintiff received the transfer.

In the fall of 2006, plaintiff was "removed from the field," meaning he could no longer work at a particular fire station. Plaintiff had been working at a station in Eagle Rock under Battalion Chief Logan. Plaintiff was dissatisfied with the manner in which his crew was being treated. Plaintiff reported that there was "some harassment" occurring and he did not like the way his crew was being treated. Plaintiff testified, "I documented it in the journal and he was threatening me with potential discipline." Then Chief Rueda ordered plaintiff removed from the station. Plaintiff was advised of this order by Assistant Chief Roderick Garcia.

Plaintiff filed the present action against the city on May 31, 2006. On June 28, 2006, plaintiff received a letter from Battalion Chief M.J. Arguelles, Operations Executive Officer, regarding the Libby incident discipline. Battalion Chief Arguelles stated: "On September 22, 2005, a [*Skelly*] hearing was held and you were subsequently suspended for 30-calendar days for your failure to prevent inappropriate actions by some members of your command. On September 26, 2005, you requested a hearing before a Board of Rights. [¶] The Operations office has decided to drop all charges against you.

This case is now considered closed. All reports pertaining to this case will be kept in the Operations file." Plaintiff testified the letter was unusual because the department rarely drops charges and clears anybody's name. Further, although the charges underlying the 30-day suspension were dropped, the suspension notice remained in plaintiff's personnel file. The statement that all of the papers concerning the Libby incident would be kept in the "Operations file" was false. Plaintiff looked in his personnel file a few weeks before trial and saw that the suspension notice was still in the file. Plaintiff testified a firefighter's personnel file would be considered in the promotion process. Plaintiff testified he would not be promoted: "My personal opinion is that I stand up to these high ranking officers that run the department. I protest their orders to treat people differently and they don't like that."

2. Adverse Employment Action

As noted above, defendant asserts it was error to deny a judgment notwithstanding the verdict because there was no substantial evidence plaintiff suffered any adverse employment action. In *Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at pages 1035-1036, the Supreme Court considered how the term "adverse employment action" should be defined for purposes of a Fair Employment and Housing Act retaliation claim. The Supreme Court concluded, "[T]he proper standard for defining an adverse employment action is the 'materiality' test, a standard that requires an employer's adverse action to materially affect the terms and conditions of employment [citation] . . . [and] in determining whether an employee has been subjected to [adverse employment action], it is appropriate to consider the totality of the circumstances . . . ." (*Id.* at p. 1036; accord, *Jones v. The Lodge at Torrey Pines Partnership*, *supra*, 42 Cal.4th at p.1168.) Whether there has been an adverse employment action is a fact and context specific inquiry: "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse

employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1052, fn. omitted.)

The trier of fact does not consider each alleged retaliatory act in isolation. (*Yanowitz v. L'Oreal USA, Inc.*, *supra,* 36 Cal.4th at p. 1055; *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 373-374.) As the Supreme Court noted in *Yanowitz,* "[W]e need not and do not decide whether each alleged . . . act constitutes an adverse employment action in and of itself." (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1055; accord, *Jones v. R.J. Donovan Correctional Facility* (2007) 152 Cal.App.4th 1367, 1381.) The Supreme Court has explained, "Contrary to [defendant's] assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. [Citations.]" (*Yanowitz v. L'Oreal USA, Inc.*, *supra,* 36 Cal.4th at p. 1055; *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424.)

The Supreme Court has broadly construed the statutory language "in compensation or in the terms, conditions, and privileges of employment" in Government Code section 12940, subdivision (a): "Appropriately viewed, this provision protects an employee against unlawful discrimination with respect not only to so-called ultimate employment action such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment . . . , the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the

realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the [Fair Employment and Housing Act] was intended to provide. [¶] . . . [T]he determination of what type of adverse treatment properly should be considered discrimination in the terms, conditions, or privileges of employment is not, by its nature, susceptible to a mathematically precise test, and the significance of particular types of adverse actions must be evaluated by taking into account the legitimate interests of both the employer and the employee. Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of [Government Code] sections 12940 [subdivision (a)] and 12940 [subdivision (h)]." (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at pp. 1054-1055, fns. omitted; see *Horsford v. Board of Trustees of California State University, supra,* 132 Cal.App.4th at p. 373.)

The adverse employment action element may be satisfied by evidence the defendant's retaliatory conduct reduced the employee's promotional opportunities. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1445, 1456-1457.) In *Akers*, a successful prosecutor claimed she was subject to retaliation after she engaged in protected activity. The plaintiff presented evidence that: four months after she engaged in protected activity, her employer issued a negative performance evaluation accusing her of dishonesty; there was evidence a dishonesty accusation could be "'a career ender'"; as a deputy district attorney, the plaintiff's reputation for honesty was essential; and further, the next level of promotion was highly competitive and largely dependent on superiors' subjective evaluations. The Court of Appeal noted, "[R]educed promotional opportunities may constitute an adverse employment action under the [Fair Employment

and Housing Act]." (*Ibid.*) The defendant argued a negative performance review was not an adverse employment action. The Court of Appeal held: "We agree that a mere oral or written criticism of an employee . . . does not meet the definition of an adverse employment action . . . . [Citations.] But, as [defendant] recognizes, the issue requires a factual inquiry and depends on the employer's other actions. An unfavorable employee evaluation may be actionable where the employee proves the 'employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment.' [Citations.] Thus, although written criticisms alone are inadequate to support a retaliation claim, where the employer wrongfully uses the negative evaluation to substantially and materially change the terms and conditions of employment, this conduct is actionable. [¶] Here, taking into account the totality of the circumstances, including the language used in the performance evaluation . . . which labeled [the plaintiff] as dishonest, incompetent and insubordinate, and the evidence that the top management demonstrated its willingness to use this information against [the plaintiff] in significant employment decisions, there was sufficient evidence for the jury to find [the employer's] retaliatory actions would preclude reasonable promotional opportunities and therefore constituted adverse employment actions under [the Fair Employment and Housing Act]." (*Id.* at p. 1457, fn. omitted; see *Pinero v. Specialty Restaurants Corp.* (2005) 130 Cal.App.4th 635, 646.)

Plaintiff presented evidence he had been a dedicated, hard-working, respected firefighter poised to advance in the department; yet, in the year after he voiced opposition to the department's illegal preferential treatment policy, he was subjected to repeated acts of retaliation. First, he was reprimanded for his conduct during the June 19, 2004 training drill. The charges against him would have been dropped but for the fact that the department had a recruitment and retention problem when it came to firefighters who were women, Chief Fox had "all these other cases going on with the females," and plaintiff had been accused of over-drilling a female firefighter, resulting in her injury. Second, plaintiff immediately began to receive less favorable performance evaluations.

There is evidence a superior was criticized for giving plaintiff an overall excellent rating. A deputy chief and an assistant chief disagreed with the overall excellent rating because of the June 19, 2004 training incident and the discipline that followed. A deputy chief believed the training incident demonstrated plaintiff's immaturity and inability to manage a fire station. Third, plaintiff was denied appointment as captain of the urban search and rescue team, a position there is evidence he should have gotten, and which likely would have led to his promotion to battalion chief. There is evidence plaintiff should have been named captain of the urban search and rescue team because he was better qualified than the individual appointed and he had significantly greater experience. Fourth, plaintiff belatedly received a 30-day suspension—significant discipline—for an incident of which he had no knowledge and was not present when it occurred. The proposed discipline imposed on plaintiff was equal to that imposed on individuals who directly participated in the wrongdoing. Moreover, a deputy chief offered no objection when plaintiff stated that the discipline was being imposed in retaliation for opposing the preferential treatment policy. The deputy chief said he was under pressure from the department and had to do what he had to do, even if it was unpleasant. Plaintiff said he could not get a fair shake in the department and might have to resort to litigation. The deputy chief responded he did not mind depositions. Further, although the 30-day suspension was later rescinded, the notice remained in plaintiff's personnel file, hampering his ability to promote. Fifth, plaintiff was subject to disparate treatment with respect to time off. And, sixth, he was subject to disparate treatment when responding to a tanker fire.

Defendant isolates the foregoing incidents and argues each fails on its own to rise to the level of an adverse employment action. But, as noted above: we do not decide whether each alleged act constitutes an adverse employment action by itself (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1055; *Jones v. R.J. Donovan Correctional Facility*, *supra*, 152 Cal.App.4th at p. 1381); the jury was not required to consider the incidents in isolation (*Horsford v. Board of Trustees of California State University*, *supra*, 132 Cal.App.4th at pp. 373-374); and, as our Supreme Court has explained,

retaliation can consist of a succession of subtle, yet destructive injuries. (*Yanowitz v. L'Oreal USA, Inc., supra*, 36 Cal.4th at p. 1055; *Wysinger v. Automobile Club of Southern California, supra,* 157 Cal.App.4th at p. 424). On the evidence before it, the jury could conclude plaintiff had been subjected to a series of subtle injuries that on the whole damaged his reputation within the department and halted his rise through its ranks. The jury could find plaintiff's superiors within the department were under pressure to recruit and retain women, but were repeatedly encountering complaints from female firefighters, hence were hypersensitive to any such incidents; moreover, there is testimony the department had an unofficial practice of granting preferential treatment to women, and did not look favorably upon anyone who voiced opposition or otherwise opposed that policy. Five witnesses, Captain Cappon, Captain Campos, plaintiff, Mr. Tufts, and Firefighter Mcosker testified as to the department's preferential treatment of women. Evaluated collectively in the totality of the circumstances and viewing the evidence most favorably to the verdict, we conclude there was sufficient evidence from which the jury could properly find plaintiff suffered adverse employment actions that materially affected the terms and conditions of his employment and his ability to advance in his career.

3. Retaliatory Motive

Defendant further asserts its judgment notwithstanding the verdict should have been granted because, "There is no substantial evidence that any of the five incidents of allegedly retaliatory action were motivated by unlawful retaliatory intent." Defendant presented evidence of legitimate reasons for the actions it took with respect to plaintiff. Therefore, as discussed above, it was plaintiff's burden to show by a preponderance of the evidence that the adverse employment actions were in fact the result of an illegal motive—retaliation—rather than other causes. (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 356; *Reeves v. Safeway Stores, Inc., supra,* 121 Cal.App.4th at p. 112.)

A retaliatory intent may be shown by direct or circumstantial evidence or both. (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713; *Morgan v. Regents of University of California, supra,* 88 Cal.App.4th at pp. 67, 69-70; *Trustees of Cal. State University v. Public Employment Relations Bd., supra,* 6 Cal.App.4th at p. 1124.) Because direct proof is rarely possible, a retaliatory motive is most often established by circumstantial evidence. (*Mamou v. Trendwest Resorts, Inc., supra,* 165 Cal.App.4th at p. 713; *Trustees of Cal. State University v. Public Employment Relations Bd., supra,* 6 Cal.App.4th at p. 1124.) The Court of Appeal has explained: "Both direct and circumstantial evidence can be used to show an employer's intent to retaliate. 'Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive. [Citation.]' (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 816.) Circumstantial evidence typically relates to such factors as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers. (*Ibid.*; *Flait v. North American Watch Corp.* [, *supra*,] 3 Cal.App.4th [at p.] 479.)" (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153.)

Moreover, a retaliatory motive can be proven circumstantially where an employee's career undergoes a downward trend in response to his or her complaints about illegal conduct. In *Colarossi v. Coty US Inc., supra,* 97 Cal.App.4th at pages 1153-1155, the plaintiff presented circumstantial evidence of retaliation: prior to the protected activity she had been a "'top performer'" who received "'numerous awards'"; she had been named the defendant company's best merchandiser in the country; but after the protected activity, her superiors began to scrutinize her work with skepticism; other employees were treated more leniently for identical misconduct; and the plaintiff was passed over for a position in favor of a co-employee who had helped the employer document plaintiff's deficiencies. The Court of Appeal held a trier of fact could reasonably conclude the employer's motives were retaliatory. (*Ibid.*)

We find substantial evidence supported the jury's verdict. Plaintiff joined the department as a very young man and rose quickly through the ranks. He was a rising star in the department—who aspired to rise even higher—until he came head to head with the department's problems recruiting and retaining women as firefighters. After he voiced his opposition to granting preferential treatment to firefighters who were women, his superiors began to treat him in a manner that impacted his ability to advance in his career. He was reprimanded on charges that would have been dropped but for his opposition. Further, as to the training incident, Captain Jaimes, who initiated the drill with plaintiff, was not disciplined at all. Plaintiff was passed over for appointment as captain of the urban search and rescue team despite his experience and superior qualifications in favor of a candidate with no urban search and rescue experience. Evaluations of his performance suddenly were less favorable. At one point plaintiff was unable to come to work because of the asthma he had developed after working as a member of the urban search and rescue team in lower Manhattan at the scene of the September 11, 2001 attacks. In response Deputy Chief Fox became angry when plaintiff did not come to work. Battalion Chief Duca was sent to verify plaintiff's well being—an unprecedented act. Plaintiff received notice of a 30-day suspension for the Libby incident, a matter of which he had no knowledge. He received the same proposed punishment meted out to direct participants in the incident. Further, although the actual discipline was set aside, the notice of suspension remained in plaintiff's personnel file. The notice of suspension, which never occurred, could adversely affect plaintiff's ability to promote.

The jury viewed these acts in the light of evidence: the department was intent on, and under pressure to, increase the number of women who served as firefighters; the department expected superiors to treat female firefighters preferentially; moreover, the department would take steps to undercut firefighters who stood in the way of that goal. There was testimony which was accepted that three of the five deputy chiefs who oversaw the department and one battalion chief had directed subordinates to treat women

differently and to not eliminate them from the department as a result of training issues. Deputy Chief Rueda told Captain John Cappon the department was having a hard time retaining female firefighters. Therefore, Captain Cappon was ordered to treat women differently. Deputy Chief Mack directed Captain Scott Campos on several occasions to overlook deficiencies in firefighters who were women because 100 percent of them were going to pass regardless of their ability. When Captain Campos refused a direct order to pass a female firefighter who could not perform a ladder evolution, he was relieved of his command. Captain Campos had recommended termination of women who could not throw a ladder, but his recommendations were ignored.

During the *Skelly* hearing, plaintiff opposed the department's illegal policy. Then Deputy Chief Fox said he would have to make an "organizational decision" in regard to plaintiff's discipline. Deputy Chief Fox also said he would have dropped the charges, but because of all the "cases going on with the females," he would have to impose discipline.

There is evidence Battalion Chief Arbuthnott subsequently took "a lot of heat" for giving plaintiff a favorable performance rating. Deputy Chief Rueda, who oversaw the urban search and rescue team, wanted Battalion Chief Arbuthnott to downgrade the evaluation. Plaintiff received the notice of a 30-day suspension in connection with the Libby incident. Plaintiff then confronted Deputy Chief Fox. Plaintiff accused the department of imposing the discipline in retaliation for his opposition to preferential treatment. Chief Fox admitted there were pressures on him and on the department; he said that he was going to have to do what he had to do. Plaintiff said he would never get a fair shake in the department. Chief Fox did not disagree. Plaintiff had lost hope of being promoted because, in his words, "I [stood] up to these high ranking officers that run the department. I protest[ed] their orders to treat people differently, and they don't like that."

Under these circumstances, the jury could reasonably conclude the various adverse employment actions taken against plaintiff were motivated by a retaliatory intent. The jury could reasonably conclude Deputy Chief Fox would have dropped the charges

arising out of the June 19, 2004 training drill but imposed discipline. The decision to impose discipline was not because plaintiff had mishandled the drill. Rather, the jury could find discipline was imposed because plaintiff had treated a female firefighter the same way a similar training issue involving a male co-employee would have been handled. Further, plaintiff had emphatically opposed preferential treatment for female members of the department. The jury could further conclude that but for Deputy Chief Fox's retaliatory decision, plaintiff would never have been before the Board of Rights, and hence never would have received a reprimand. As the Court of Appeal has observed, when workers are employed by large enterprises, decisions affecting employees are rarely the responsibility of one person; further, to prove a retaliatory motive, a plaintiff need not show knowledge of the protected activity and retaliatory animus at every stage of review or at every level of decision. (*Reeves v. Safeway Stores, Inc., supra*, 121 Cal.App.4th at pp. 107-110; see *DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 551.) Here, the jury could reasonably infer that the department's unofficial preferential treatment policy was known to the deputy chiefs and other individuals at the highest rungs of the department hierarchy. This is particularly true given the fact there was abundant testimony senior members of the department expressly stated women were to be treated more leniently. Five witnesses testified as to statements by five senior department officials evidencing the judgment that women be given preferential treatment. The jury could further reasonably infer that plaintiff's emphatic opposition to that policy, coupled with a reputation for treating all firefighters in the same manner, was made known to his superiors. Moreover, once plaintiff expressed his disagreement with the policy, the jury could find he was subject to unfair discipline and treatment—events that did not occur before he objected to the disparate treatment practice. Given the timing of the foregoing events and the disparate treatment accorded plaintiff, sufficient circumstantial evidence supported the jury's express finding of a retaliatory motive.

This case is different from a scenario where there is strong evidence of a neutral discriminatory reason which permits judgment to be imposed in favor of a defendant in a

wrongful *termination* case. (*Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 141-149; *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at pp. 353-354, 362.) In this case, when the issue of the training incident involving the ladder was litigated in a *Skelly* hearing, there was testimony Deputy Chief Fox said: women had to be treated differently; plaintiff's expressions of disapproval of the unlawful preferential treatment provided to women was causing a "problem"; and because it was hard to recruit women to serve in the department, the judgment to impose discipline was an organizational decision. The union president, who was present at the hearing, testified that the message related by Deputy Chief Fox was that plaintiff should have known that women were to receive preferential treatment. Eventually, the 2-day suspension was reduced after a Board of Rights hearing to a reprimand. Moreover, the Libby incident initially resulted in a 30-day suspension which was ultimately abandoned. Plaintiff was falsely told the records would be kept in an operations file. In fact, the notice of suspension remained in plaintiff's personnel file thereby detrimentally affecting his promotion chances. Five witnesses testified as to statements by senior officials in the department which were consistent with plaintiff's theory women were to be treated preferentially. This is not a case where there is strong evidence of a nondiscriminatory motivation. More to the point, *Guz* and the United States Supreme Court *Reeves* decision are not retaliation cases. They both involve age discrimination claims arising from decisions to terminate employment. (*Reeves v. Sanderson Plumbing Products, Inc.*, *supra*, 530 U.S. at p. 138; *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 325.)

4. Conclusion

Substantial evidence supported the jury's determination plaintiff suffered adverse employment actions in retaliation for refusing to treat women differently than male firefighters. The trial court correctly concluded the evidence warranted the denial of defendant's judgment notwithstanding the verdict motion. Accordingly, the order

denying the judgment withstanding the verdict motion is affirmed. (*Clemmer v. Hartford Ins. Co., supra*, 22 Cal.3d at p. 878; *Brandenburg v. Pac. Gas & Elec. Co.* (1946) 28 Cal.2d 282, 284.)

## C. New Trial

### 1. Standard of review

Defendant contends: the trial court committed prejudicial error when it denied defendant's new trial motion; the trial court erroneously admitted incompetent and excluded competent opinion testimony; and the damage award was excessive. Typically, we review the order denying a new trial for an abuse of discretion. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859; *Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 452; *Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387.) But, any decision underlying a new trial denial order is scrutinized under the test appropriate to such determination. (See *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 859; *People v. Waidla* (2000) 22 Cal.4th 690, 730; *People v. Alvarez* (1996) 14 Cal.4th 155, 188.) Prejudicial error is a prerequisite to a grant of a new trial motion. (Cal. Const., art. VI, § 13; *Garcia v. Rehrig Internat., Inc.* (2002) 99 Cal.App.4th 869, 874-875; *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 305-306; *Russell v. Dopp* (1995) 36 Cal.App.4th 765, 779-780.) Our Supreme Court has held: "We are mindful of the fact that a trial judge is accorded a wide discretion in ruling on a motion for new trial and that the exercise of this discretion is given great deference on appeal. (See *Malkasian v. Irwin* [(1964)] 61 Cal.2d 738, 747; 6 Witkin, Cal. Procedure (2d ed. 1971) § 293, pp. 4278-4279.) However, we are also mindful of the rule that on an appeal from the judgment it is our duty to review all rulings and proceedings involving the merits or affecting the judgment as substantially affecting the rights of a party (see Code Civ. Proc., § 906), including an order denying a new trial. In our review of such order *denying* a new trial, as distinguished from an order *granting* a new trial, we must

fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial. (*Deward v. Clough* (1966) 245 Cal.App.2d 439, 445; *Wilkinson v. Southern Pac. Co*. (1964) 224 Cal.App.2d 478, 483-484. See *Tobler v. Chapman* [(1963)] 31 Cal.App.3d 568, 578-579.)" (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.)

2. Evidentiary Rulings

a. standard of review

As noted, when reviewing adverse rulings which serve as the basis of a new trial motion, we apply the standard of review which applies to the particular issue. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 859; *People v. Waidla, supra,* 22 Cal.4th at p. 730.) We review the trial court's evidentiary rulings for an abuse of discretion. (*Deutsch v. Masonic Homes of California, Inc.* (2008) 164 Cal.App.4th 748, 766; *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347-1348 & fn. 3; *In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564.) Any error in admitting or excluding evidence warrants a new trial only if the error resulted in a miscarriage of justice (Cal. Const., art. VI, § 13; Evid. Code, §§ 353, 354; Code Civ. Proc., § 475; *Sparks v. Redinger* (1955) 44 Cal.2d 121, 123; *Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 262; *Bristow v. Ferguson* (1981) 121 Cal.App.3d 823, 826; *People ex rel. Dept. Pub. Wks. v. Hunt* (1969) 2 Cal.App.3d 158, 172; *Townsend v. Gonzalez* (1957) 150 Cal.App.2d 241, 249-250; 47 Cal.Jur.3d, New Trial, § 105)—that is, "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

b. Karen Smith

Defendant filed a motion in limine in the trial court "for an Order excluding from trial the plaintiff's designated expert Karen Smith" on the grounds her testimony was: irrelevant; lacked foundation; posed the possibility of misleading and confusing the jury; and would necessitate an undue consumption of time. The trial court ruled plaintiff could present evidence of damages based on the lack of a promotion to battalion chief provided he lay a foundation as to the "reasonable certainty" of such promotion. Defendant now contends: no such foundational evidence was presented; Ms. Smith assumed plaintiff would be promoted; but there was no evidence regarding the probability of promotion.

No abuse of discretion occurred. There was sufficient evidence for the jury to find plaintiff likely would have been promoted to battalion chief but for his opposition to treating firefighters differently based on their gender. Plaintiff graduated at the top of his recruit class. He was a highly regarded firefighter with excellent to outstanding abilities who was quickly promoted through the ranks. He was well qualified for but was denied the urban search and rescue captain position—a stepping-stone to battalion chief. Between 1993 and 2007, five urban search and rescue captains had been promoted to battalion chief. The current urban search and rescue captain, identified only as Captain Elder, was about to be promoted to battalion chief. Battalion Chief Arbuthnott believed if plaintiff were to apply, he "absolutely" had a chance to make battalion chief. Plaintiff did not apply for promotion to battalion chief in 2006 because two of the three superiors who would have determined his fate were individuals about whom he had complained. This was sufficient evidence from which the jury could conclude it was reasonably likely that but for plaintiff's protected activity and defendant's retaliation, plaintiff would have applied for battalion chief and likely would have been promoted.

c. Captain Donald Reyes

Defendant argues the trial court erroneously admitted testimony by Captain Reyes. Defendant objected to Captain Reyes's proposed testimony as follows: "[Deborah Breithaupt for defendant]: And then regarding Don Reyes, your honor, he is a captain I on the [urban search and rescue] unit. He was not on the selection panel for the [urban search and rescue] captain position at issue. He is not [a] percipient [witness] to the interview process or any aspect of it. [¶] The Court: So we'll look at his foundation, too. He doesn't have to be on it to say he thinks [plaintiff] would have been great to do it, though. [¶] Ms. Breithaupt: That's not what he said. [Plaintiff's counsel, Gregory] Smith said that [Captain Reyes] was going to testify that [plaintiff] was better qualified and there is just simply no foundation. [¶] The Court: We'll see. We'll see what the foundation is. I'll be watching for that." On appeal, defendant argues: Captain Reyes's expertise was in urban search and rescue, not in the qualifications for the captain II position; the trial court was obliged to limit Captain Reyes's testimony to the area of his expertise; instead, Captain Reyes was allowed to testify regarding the urban search and rescue captain II interview process and expressed the opinion that plaintiff was better qualified than Captain Elder, who was appointed. Defendant asserts, "[Captain] Reyes had no knowledge of the interview rankings and no experience rating applicants for the position." Therefore, defendant asserts Captain Reyes should not have been permitted to testify regarding plaintiff's qualifications for the urban search and rescue captain position.

Captain Reyes testified he had been with the department for 23 years. His specialty was in urban search and rescue and swift water rescue. He had been involved with the urban search and rescue team since it was started in 1993. For the past two years, he had acted as the Federal Emergency Management Agency team training officer for the urban search and rescue team. He had taken quite a few classes in urban search and rescue. The department had called him an "expert" in that area. Captain Reyes had

lectured on urban search and rescue techniques all over the United States and in New Zealand. The trial court found Captain Reyes was an "expert" in the urban search and rescue field.

Captain Reyes encouraged plaintiff to join the urban search and rescue team. Captain Reyes made the recommendation because plaintiff: was "a bullet"—somebody who was "really sharp;" was "real conscientious"; and "really takes the time to learn their job really well." Further, Captain Reyes testified about plaintiff, "He was an outstanding firefighter." Captain Reyes had worked with plaintiff since 1993. Captain Reyes described plaintiff's background in urban search and rescue: "He has had the urban search and rescue training classes, [and] he has been an active member of our team, of urban search and rescue team. He was one of our task force members that went with us on 9/11 to respond to the World Trade Center and worked with us there to help try to effect rescues. Participated with us in other places. Training exercises. I don't know if I can name them all but just a lot of training exercises that [plaintiff] has been at, participated in over the years." Captain Reyes testified plaintiff possessed "excellent" abilities in the urban search and rescue field. Captain Reyes testified plaintiff had "very good" leadership capabilities.

Captain Reyes had also worked closely with Captain Elder. This close working relationship followed Captain Elder's appointment as captain of the urban search and rescue team. Captain Reyes was familiar with Captain Elder's training and experience. Captain Reyes testified that Captain Elder had not been a part of the urban search and rescue team prior to the appointment as its captain. Moreover, according to Captain Reyes, Captain Elder had not trained to be on the team. Further, Captain Elder had not taken any of the urban search and rescue courses. Captain Reyes testified, "I had to train him in the sense of learning a lot of the things about the job that he would need to know to try and be able to help us." Captain Reyes was familiar with the qualifications for the urban search and rescue unit. Captain Reyes believed Captain Elder did not have the ability to schedule and direct urban search and rescue training activities nor the training

to respond to technical rescue incidents. There was no doubt in Captain Reyes's mind that plaintiff was better qualified in 2005 to become the captain in charge of the urban search and rescue unit.

We find no abuse of discretion. Captain Reyes did not purport to testify as a percipient witness to the interview process. Captain Reyes did not testify plaintiff was better qualified in terms of the interview process or the rating system used in that process. Rather, Captain Reyes relied on his expertise in urban search and rescue. Moreover, Captain Reyes had worked with both Captain Elder and plaintiff. Captain Reyes concluded that in 2005 plaintiff was better qualified, in terms of skills and abilities, than was Captain Elder, to take charge of the urban search and rescue unit. Further, defense counsel conducted an effective cross-examination of Captain Reyes. She elicited testimony that: Captain Reyes was not on the hiring interview panel; did not help to formulate the questions for the interview panel; and did not see how interviewees were rated. Additionally, Captain Reyes's testimony was countered by Battalion Chief Edward Bushman, who participated in the interview process. Battalion Chief Bushman was responsible for the urban search and rescue program and was one of three members of the interview panel. Battalion Chief Bushman testified Captain Elder had the highest interview score while plaintiff had the lowest. No prejudice resulted.

d. Karyn E. Model, Ph.D.

Defendant argues the trial court committed prejudicial error in refusing to allow Dr. Model, an economist, to testify based on actual data, that the probability of promotion from Captain II to Battalion Chief is 37 percent and that only 33 percent of the urban search and rescue captains have promoted to battalion chief. At trial, defense counsel orally stated Dr. Model utilized statistics provided by the department's personnel office. Evidence Code section 801 states: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject

that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made know to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." A witness may in some circumstances rely, in rendering an opinion, on statements made by or information received from other persons. (E.g., *People v. Catlin* (2001) 26 Cal.4th 81, 138-139 [physician relied on patient's self-reported history]; *People v*. Wilson (1944) 25 Cal.2d 341, 348 [same]; *Betts v. Southern California Fruit Exch.* (1904) 144 Cal. 402, 409 [market price obtained from others relied on in establishing character of transaction rather than value of lemons]; *Kelley v. Bailey* (1961) 189 Cal.App.2d 728, 737-738 [physician relied on other physician's reports]; *Hammond Lumber Co. v. County of Los Angeles* (1930) 104 Cal.App. 235, 247-248 [witness relied on statistics in reaching conclusion about value of land]; compare e.g., *Hodges v. Severns* (1962) 201 Cal.App.2d 99, 106-108 [accident reconstruction witness could not rely on another person's statement as to point of impact]; *Ribble v. Cook* (1952) 111 Cal.App.2d 903, 906 [same]; *Behr v. County of Santa Cruz* (1959) 172 Cal.App.2d 697, 709-710 [opinion witness could not rely on assumption not based on any evidence].) In *People v. Catlin*, *supra*, 26 Cal.4th at page 137, our Supreme Court described the scope of judicial discretion available to a trial judge when restricting the extent upon which an opinion witness relies on data provided by a third person: '"[A]n expert may generally base his opinion on any "matter" known to him, including hearsay not otherwise admissible, which may "reasonably . . . be relied upon" for that purpose. [Citations.] On direct examination, the expert may explain the reasons for his opinions, including the matters he considered in forming them. However, prejudice may arise if, '"under the guise of reasons,"' the expert's detailed explanation '"[brings] before the jury incompetent hearsay evidence."'" (*People v. Montiel* (1993) 5 Cal.4th 877, 918; see

Evid. Code, § 801, subd. (b); *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619.) In this context, the court may "'exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value."' (*People v. Carpenter* [(1997)] 15 Cal.4th [312,] 403 [overruled on another point by Proposition 115 (1990) as stated in *Verdin v. Superior Court* (2008) 43 Cal. 4th 1096, 1106-1107].)" These are matters generally left to the trial court's judgment. (*People v. Catlin, supra*, 26 Cal.4th at p. 137; *People v. Montiel, supra*, 5 Cal.4th at p. 919.)

As can be noted, a trial court retains discretion to limit a witness offering an opinion from testifying to information provided by third persons. There was no evidence as to the reliability and relevance of the statistical data Dr. Model would cite to in her testimony. The trial court expressly ruled that defendant would have to lay a foundation for the statistical data. Defendant never produced any foundational testimony concerning the statistical data. The trial court did not foreclose defendant from presenting foundational testimony concerning the collection of the statistical data at issue. The trial court did not abuse its discretion in requiring defendant to produce proper foundation before Dr. Model could rely on the statistical data in forming an opinion concerning the chances plaintiff would promote.

3. Excessive Damages

Code of Civil Procedure section 657, which specifies the grounds for a new trial, provides in part: "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: . . . [¶] 5. Excessive or inadequate damages. [¶] . . . [¶] A new trial shall not be granted upon the ground of . . . excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly

should have reached a different verdict or decision." The Supreme Court has held, "A reviewing court must uphold an award of damages whenever possible (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 508) and all presumptions are in favor of the judgment (*Torres v. City of Los Angeles* [(1962)] 58 Cal. 2d [35,] 43; *Leming v. Oilfields Trucking Co.* (1955) 44 Cal.2d 343, 356.)" (*Bertero v. National General Corp.* [(1974)] 13 Cal.3d [43,] 61.) It is well-established, as the Supreme Court has held: "The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial . . . . [A]ll presumptions are in favor of the decision of the trial court [citation]. The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." (*Seffert v. Los Angeles Transit Lines, supra,* 56 Cal.2d at pp. 506-507; accord, *Bond v. United Railroads* (1911) 159 Cal. 270, 286; *Iwekaogwu v. City of Los Angeles, supra,* 75 Cal.App.4th at pp. 820-821; *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 410; *Wright v. City of Los Angeles* (1990) 219 Cal.App.3d 318, 354; *DiRosario v. Havens* (1987) 196 Cal.App.3d 1224, 1240.) Moreover, our Supreme Court has held: "It is only in a case where the amount of the award of general damages is so disproportionate to the injuries suffered that the result reached may be said to shock the conscience, that an appellate court will step in and reverse a judgment because of greatly excessive or grossly inadequate general damages." (*Daggett v. Atchison, T. & S.F.Ry. Co.* (1957) 48 Cal .2d 655, 666; accord, *Wright v. City of Los Angeles, supra,* 219 Cal.App.3d at p. 354; *DiRosario v. Havens, supra,* 196 Cal.App.3d at p. 1241.)

In terms of future economic loss, defendant argues the jury's award of damages is unsupported. Ms. Smith, a forensic economist, calculated plaintiff's economic loss based on an assumption that but for defendant's retaliation, he would have been promoted to battalion chief in July 2009. But defendant argues that assumption was not supported by

the evidence. Simply stated, defendant contends the possibility of plaintiff being promoted was purely speculative. We disagree. There was substantial evidence from which the jury could conclude that but for plaintiff's opposition to department policy toward firefighters who were women, he would have been promoted at least to the rank of battalion chief. There was substantial evidence that prior to plaintiff's expressed opposition to the department policy illegally favoring female firefighters, he was a rising star who aspired to reach the next step in the department hierarchy—that of battalion chief. Despite being better qualified, plaintiff was denied appointment as captain of the urban search and rescue team, a stepping stone to battalion chief. Captain Reyes testified he had been with the urban search and rescue team since it started, in 1993. During that time, at least five urban search and rescue captain IIs had been promoted to battalion chief. At the time of trial, Captain Elder, captain of the urban search and rescue team, was about to be promoted to battalion chief. Also, plaintiff received poor performance evaluations in retaliation for his opposition, hampering his ability to promote. The jury could conclude that in the absence of the department's retaliation, plaintiff would have achieved the rank to which he aspired. There was evidentiary support for the jury's award of damages for future economic loss.

Defendant asserts the past and future noneconomic damage awards are excessive. In terms of past noneconomic loss, defendant argues the jury's award of $2 million is so large it raises a presumption of passion or prejudice. In terms of future noneconomic loss, defendant asserts: "There is no substantial evidence to support the jury's award of $960,000.00 for future non-economic loss. To entitle [plaintiff] to recover present damages for apprehended future consequences, there must be evidence to show a reasonable certainty that the damages will occur as a result of a compensable injury. [Citation.] No evidence was presented to show that [plaintiff] will suffer future non-economic loss. [Plaintiff] still works for and loves the [Los Angeles Fire Department]. . . . Yet the jury awarded damages of $960,000 for future non-economic loss. . . . That

award cannot stand because a damage award 'must not be speculative, remote, contingent or merely possible.' [Citations.]"

An employee may recover for emotional injury and other nonpecuniary harm under a Fair Employment and Housing Act cause of action. (*Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 45, 48; *State Personnel Board v. Fair Employment & Housing Com.* (1985) 39 Cal.3d 422, 434; *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 215, 221.) A jury may, in its subjective discretion, award a plaintiff reasonable compensation for noneconomic damages which he or she has suffered or will suffer in the future as a result of the harm inflicted by the defendant. (*Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 103; *Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 38; *Garfoot v. Avila* (1989) 213 Cal.App.3d 1205, 1210; see *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 766, fn. 10.) The Court of Appeal has held: "A jury may award a plaintiff reasonable compensation for physical pain, discomfort, fear, anxiety and other emotional distress which he has suffered and which he will suffer in the future as the result of an injury. The law does not prescribe a definite standard or method to calculate compensation for pain and suffering. The jury is merely required to award an amount that is reasonable in light of the evidence. (BAJI No. 14.13 (7th ed. 1986).) An appellate court may not disturb an award of such general damages unless the amount 'is so disproportionate to the injuries suffered that the result reached may be said to shock the conscience . . . .' (*Daggett v. Atchison, T & S. F. Ry. Co.* (1957) 48 Cal.2d 655, 666; *DiRosario v. Havens* [, *supra*,] 196 Cal.App.3d [at p.] 1241.)" (*Damele v. Mack Trucks, Inc., supra,* 219 Cal.App.3d at p. 38.) Our Supreme Court recognized the difficulty involved in this task in *Beagle v. Vasold* (1966) 65 Cal.2d 166, 172: "One of the most difficult tasks imposed upon a jury in deciding a case involving personal injuries is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. No method is available to the jury by which it can objectively evaluate such damages, and no witness may express his subjective opinion on the matter. (See 7

Wigmore, Evidence (3d ed. 1940) § 944, pp. 55-56.) In a very real sense, the jury is asked to evaluate in terms of money a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy. As one writer on the subject has said, 'Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the judge can, in his instructions, give the jury no standard to go by; he can only tell them to allow such amount as in their discretion they may consider reasonable. . . . The chief reliance for reaching reasonable results in attempting to value suffering in terms of money must be the restraint and common sense of the jury. . . .' (McCormick on Damages, § 88, pp. 318-319.)" (Accord, *Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 893 [pain and suffering damages "must be resolved by the 'impartial conscience and judgment of jurors . . . .'"].)

With respect to future noneconomic damages, a plaintiff may recover for future suffering if he or she is "'*reasonably certain*'" to endure the harm. (*Hoy v. Tornich* (1926) 199 Cal. 545, 555; *Wiley v. Young* (1918) 178 Cal. 681, 686-687; *Garcia v. Duro Dyne Corp.* (2007) 156 Cal.App.4th 92, 97-98; see *Loth v. Truck-A-Way Corp., supra,* 60 Cal.App.4th at p. 766, fn. 10; BAJI No. 14.13 (2007-2008 ed.); CACI No. 3905A (2009 ed.).) Noneconomic harm is genuine and requires compensation even though the translation into monetary loss is very difficult. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 953, disapproved on another point in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 575, fn. 4; *Capelouto v. Kaiser Foundation Hospitals, supra,* 7 Cal.3d at p. 893.) It is the jurors who are in the best position to assess the degree of harm suffered and assign a monetary amount as compensation. (*Peralta Community College Dist. v. Fair Employment & Housing Com., supra,* 52 Cal.3d at pp. 56-57; *Agarwal v. Johnson, supra,* 25 Cal.3d at p. 953; *Capelouto v. Kaiser Foundation Hospitals, supra,* 7 Cal.3d at p. 893.) No expert testimony is required. (*Capelouto v. Kaiser Foundation Hospitals, supra,* 7 Cal.3d at p. 895.) The Court of Appeal has stated it this way: "It is for the jury to determine the probabilities as to whether future detriment is reasonably certain to

occur in any particular case. (*Ostertag v. Bethlehem Etc. Corp.* (1944) 65 Cal.App.2d 795, 805-806, 807 . . . .)" (*Garcia v. Duro Dyne Corp., supra,* 156 Cal.App.4th at p. 97.) A plaintiff's own testimony commonly establishes noneconomic damages. (*Capelouto v. Kaiser Foundation Hospitals, supra,* 7 Cal.3d at p. 895; see *Loth v. Truck-A-Way Corp., supra,* 60 Cal.App.4th at p. 768.)

In considering whether damages are excessive, we apply a deferential standard of review. (*Bertero v. National General Corp., supra,* 13 Cal.3d at p. 61; *Seffert v. Los Angeles Transit Lines, supra,* 56 Cal.2d at pp. 506-508.) Our Supreme Court has held: "It must be remembered that the jury fixed these damages, and that the trial judge denied a motion for new trial, one ground of which was excessiveness of the award. These determinations are entitled to great weight. The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently, as in this case, see the injury and the impairment that has resulted therefrom. As a result, all presumptions are in favor of the decision of the trial court (*McChristian v. Popkin*, 75 Cal.App.2d 249, 263). The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury. The proper rule was stated in *Holmes v. Southern Cal. Edison Co.*, 78 Cal.App.2d 43, 51, as follows: 'The powers and duties of a trial judge in ruling on a motion for new trial and of an appellate court on an appeal from a judgment are very different when the question of an excessive award of damages arises. The trial judge sits as a thirteenth juror with the power to weigh the evidence and judge the credibility of the witnesses. If he believes the damages awarded by the jury to be excessive and the question is presented, it becomes his duty to reduce them. (Citing cases.) When the question is raised his denial of a motion for new trial is an indication that he approves the amount of the award. An appellate court has no such powers. It cannot weigh the

evidence and pass on the credibility of the witnesses as a juror does. To hold an award excessive it must be so large as to indicate passion or prejudice on the part of the jurors.' In *Holder v. Key System*, 88 Cal.App.2d 925, 940, the court, after quoting the above from the *Holmes* case added: 'The question is not what this court would have awarded as the trier of the fact, but whether this court can say that the award is so high as to suggest passion or prejudice.' In *Wilson v. Fitch*, 41 Cal. 363, 386, decided in 1871, there appears the oft-quoted statement that: 'The Court will not interfere in such cases unless the amount awarded is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was under the influence of passion or prejudice. In this case, whilst the sum awarded appears to be much larger than the facts demanded, the amount cannot be said to be so grossly excessive as to be reasonably imputed only to passion or prejudice in the jury. In such cases there is no accurate standard by which to compute the injury, and the jury must, necessarily, be left to the exercise of a wide discretion; to be restricted by the Court only when the sum awarded is so large that the verdict shocks the moral sense, and raises a presumption that it must have proceeded from passion or prejudice.' This same rule was announced in *Johnston v. Long*, 30 Cal.2d 54, 76, where it was stated that it 'is not the function of a reviewing court to interfere with a jury's award of damages unless it is so grossly disproportionate to any reasonable limit of compensation warranted by the facts that it shocks the court's sense of justice and raises a presumption that it was the result of passion and prejudice.' See also *Connolly v. Pre-Mixed Concrete Co.*, 49 Cal.2d 483, 488; *Leming v. Oilfields Trucking Co.*, *supra*, 44 Cal.2d at p. 359; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 255. [¶] There are no fixed or absolute standards by which an appellate court can measure in monetary terms the extent of the damages suffered by a plaintiff as a result of the wrongful act of the defendant. The duty of an appellate court is to uphold the jury and trial judge whenever possible. *Crystal Pier Amusement Co. v. Cannan*, 219 Cal. 184, 192. The amount to be awarded is 'a matter on which there legitimately may be a wide difference of opinion' (*Roedder v. Lindsley*, 28 Cal.2d 820, 823). In considering the

contention that the damages are excessive the appellate court must determine every conflict in the evidence in respondent's favor, and must give him the benefit of every inference reasonably to be drawn from the record (*Kimic v. San Jose-Los Gatos etc. Ry. Co.*, 156 Cal. 273, 277). [¶] While the appellate court should consider the amounts awarded in prior cases for similar injuries, obviously, each case must be decided on its own facts and circumstances. Such examination demonstrates that such awards vary greatly. (See exhaustive annotations in 16 A.L.R.2d 3, and 16 A.L.R.2d 393. Injuries are seldom identical and the amount of pain and suffering involved in similar physical injuries varies widely.) These factors must be considered. *Leming v. Oilfields Trucking Co., supra*, 44 Cal.2d 343, 356; *Crane v. Smith*, 23 Cal.2d 288, 302. Basically, the question that should be decided by the appellate courts is whether or not the verdict is so out of line with reason that it shocks the conscience and necessarily implies that the verdict must have been the result of passion and prejudice." (*Seffert v. Los Angeles Transit Lines, supra*, 56 Cal.2d at pp. 506-508; accord, *Bertero v. National General Corp., supra,* 13 Cal.3d at p. 61.)

Plaintiff testified concerning his noneconomic damages as follows: "Q. Sir, how has this—these incidents affected you emotionally? [¶] A. Emotionally it's been very—I've had a lot of feelings of betrayal from my employer that I love so much and have since I've been 15. It's been embarrassing at times in the sense that I've never had my name cleared on certain things. [¶] I've had sleepless nights. A lot of anxiety. I feel like I'm being watched under a microscope by my superiors. And you know I feel the worst part is my family, especially my kids have had to suffer because a lot of times on my days off I spent trying to defend myself or, you know, jump through some type of hoops to type a letter, to get a transfer to a station which has taken time away from me with my kids or just spend time with them as a father. [¶] Q. How important is time with your family to you? [¶] A. You know time to my kids—I have three of my own. We adopted one—is—and my wife—time is everything. I take as much time off as I can on a moment's notice if a tournament comes up, I like to be there for them. [¶] . . . [¶]

Q. . . . What do you think your chances are of promoting in the next 20 years? [¶] A. I think my chances of promoting—I'm as high as I'm going to go. My track record, I've been a very dedicated person, study hard. I ensure the safety of my crew when I'm training. And I mean I stepped up and basically I went against management for several reasons, . . . . [¶] . . . [¶] Q. . . . How does it make you feel that you believe that you're not going to achieve the position of battalion chief? [¶] [A.] I feel like a career void and I feel, you know, just like an overall betrayal from—not the department, not the city—the managers running it that have ultimate control of appointing the chief officers."

Plaintiff's counsel argued to the jury: "There is pain and suffering. Humiliation, things of that nature. The thing is, is how when you think about damages for Frank Lima for pain and suffering you have got to think about how important this job is to him and what has been taken away from him. Not only has his opportunity to promote been taken away from him forever but his opportunity to excel in the department that he loves has been taken away from him. He is afraid to drill now because of anything he does wrong they are going to go after him. [¶] There is an emotional attachment that many people have to their jobs. Some people, when they lose their jobs, they go out and they buy a gun and stick it in their mouth and blow their brains out, because that's how important their work is to them. To Frank Lima working in the fire department is everything. He doesn't know anything else. This is his life. And what they have done to him is cruel. It is absolutely cruel. And they don't care. And now they want to beat him up here in court. And they have tried. [¶] But they are not going to leave Frank alone. But if Frank wins this lawsuit, they are going to leave him alone. Frank will be able to go on, I hope. It will at least give them a message. You know, whether they are or not, I don't even know. [¶] But Frank has described in great detail what he has gone through to you. The loss of his position. He was a well-liked person at the fire department. And I'm going to ask you to award a number [for] pain and suffering, and it's going to be a large number. And it's not a number to punish the fire department. It's a number to compensate Frank for what I believe he is entitled to based on all of the evidence that

came in, in this trial. [¶] And it's a large number, but I want to tell you one thing if I ask you, if you feel right now, you know what, yeah, Frank Lima deserves a large number but $3 million is too much. It's too much. And you cut it down to 1.5 million, you're just giving Frank Lima half justice. He needs full justice. And what I'm going to ask you to award him is between [$]3 and $5 million for pain and suffering. I understand that's a lot of money. But that's, I think, what he deserves to make him whole for what he has gone through, and what he is going to be going through in the future. Because don't forget, he is entitled to compensation for what he goes through in the future."

The jury was properly instructed: "The following are the specific items of noneconomic damages claimed by Frank Lima: [¶] 1. Past and future mental suffering, loss of enjoyment of life, inconvenience, grief, anxiety, humiliation, or emotional distress. [¶] To recover for future mental suffering, loss of enjoyment of life, inconvenience, grief, anxiety, humiliation, or emotional distress Frank Lima must prove that he is reasonably certain to suffer that harm. [¶] No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense. [¶] Your award for noneconomic damages should not be reduced to present cash value." (See BAJI No. 14.13, *supra*; CACI No. 3905A, *supra*; *Hoy v. Tornich, supra,* 199 Cal. at p. 555; *Wiley v. Young, supra,* 178 Cal. at pp. 686-687; *Loth v. Truck-A-Way Corp., supra,* 60 Cal.App.4th at p. 769; 23 Cal.Jur.3d Damages § 224.)

There was substantial evidence plaintiff had suffered noneconomic damages and was reasonably certain to suffer such harm in the future. There was substantial evidence: plaintiff was a highly dedicated, hard-working member of the department; his dream as a teenager had been to become a firefighter; he desired to advance into the higher echelons of the department; he took his job seriously and was committed to training firefighters so that they would be safe when fighting fires; he was deeply affected by the department's retaliatory conduct toward him; he felt betrayed, embarrassed, and unduly scrutinized; he felt as though his superiors had him under a microscope; his desire to train other

firefighters had been undermined; he had no expectation of ever being promoted; and when the verdict was rendered, plaintiff had been experiencing the effects of the department's retaliation for more than two years. He expected to continue working for the department for another 20 years without advancing.

Moreover, it is clear the jury believed plaintiff and empathized with him. During oral argument on defendants' judgment notwithstanding the verdict and new trial motions, the trial court observed that the jury had not only believed plaintiff's version of the events, but had strong empathy for him. The trial court stated: "It seems to me that there is a lot that goes on in terms of a trial with a jury and whether or not they believe someone and whether or not they find their testimony convincing. And part of what's unstated from a dry transcript is it seems to me that the jury found Frank Lima to be quite credible, that the jury related quite well to Mr. Lima, that he was someone who joined the fire department early in his life, dedicated his life to it and came across apparently to the jury as someone who was sincere in his attempts to train firefighters to have them be prepared for the eventualities of horrible fires and lives that are lost. And the jury completely related to him, it seems, and that's what their verdict demonstrates. And it was something that was undervalued by the city, the sincerity of Captain Lima and how the jury was going to . . . accept that and what happened. [¶] . . . [¶] . . . I indicated to you that I think that I have concerns about damages. I also have concerns about whether or not it's properly before the court by having been raised by the city, and that's something I'm going to look into because that was my biggest concern from the minute the verdict came down. But my comments really go more towards an issue of not so much that the verdict was an emotional situation but that it was one where it became a credibility contest and who were they going to believe. And it was Lima against the fire department, and they chose Lima. And they believed him instead of the higher ups in the fire department. And the jury has the right to make those credibility calls and determine that."

We agree with defendant that the amount the jury awarded plaintiff for past and future noneconomic loss is high. But the question before us is not whether we would, as triers of fact, have awarded an equal amount. (*Bertero v. National General Corp.*, *supra*, 13 Cal.3d at p. 61; *Seffert v. Los Angeles Transit Lines*, *supra*, 56 Cal. 2d at p. 507.) The degree of plaintiff's suffering and the amount of money necessary to address it were questions the jurors, who had observed plaintiff at trial and had heard all the evidence, were empowered and best qualified to assess in the first instance. (*Agarwal v. Johnson*, *supra*, 25 Cal.3d at p. 953, ["it is the members of the jury who, when properly instructed, are in the best position to assess the degree of the harm suffered and to fix a monetary amount as just compensation therefor"]; *Capelouto v. Kaiser Foundation Hospitals*, *supra*, 7 Cal.3d at p. 893; *Beagle v. Vasold*, *supra*, 65 Cal.2d at p. 172.) Given all of the evidence and the inferences from the record before us, we cannot say as a matter of law that the awards for past and future noneconomic loss are so grossly excessive as to shock our sense of justice and give rise to a presumption the jury was influenced by passion or prejudice. (*Seffert v. Los Angeles Transit Lines*, *supra*, 56 Cal.2d at pp. 506-509; see *Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 595-596 [upholding a $1 million noneconomic damage award in a FEHA sexual orientation harassment case].)

## IV. DISPOSITION

The judgment is affirmed. The orders denying the new trial and judgment notwithstanding the verdict motions are affirmed. Plaintiff, Frank Lima, is to recover his costs and attorneys fees incurred on appeal from defendant, the City of Los Angeles.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

I concur:

ARMSTRONG, J.

MOSK, J., Dissenting

I respectfully dissent.

I do not believe there was substantial evidence to support the jury's finding of an adverse employment action motivated by retaliatory intent. I also question some of the trial court's evidentiary rulings. Finally, I believe that the award of economic and noneconomic damages was excessive, a point raised by the City of Los Angeles in its new trial motion. This case is not about whether the Los Angeles Fire Department gives preferential treatment to women; it is whether there is substantial evidence to support an outsized damage award based on allegations of retaliation against plaintiff.

Employment-related appeals are particularly difficult. Without regard to any ideological bent, justices can and do have different impressions in each case as to whether there is a triable issue of fact or substantial evidence to support a verdict.

The plaintiff, a Los Angeles City Fire Department Captain, was accused by a female subordinate of creating a hostile work and training environment. He did take responsibility for the female firefighter being injured. Plaintiff, who had suffered a prior reprimand, was again reprimanded and suspended for six days for failing to take appropriate measures to ensure the safety of the female firefighter and for taking unnecessary risks with respect to her in connection with a training drill. Plaintiff's suspension was reduced to two days. Plaintiff appealed to the Board of Rights, which affirmed the reprimand based on a charge of failure to come to the aid of a firefighter. He was found not guilty of the other charge. The Board reduced the two-day suspension to a reprimand. Plaintiff never served days off or lost any pay. Plaintiff viewed this result favorably. Plaintiff was again charged—this time for failure to prevent inappropriate actions by those he supervised. Those charges were dropped. Reprimands do not preclude advancement. Indeed, plaintiff was promoted after an earlier reprimand. The battalion chief thought well of plaintiff, but his evaluation of plaintiff reflected

certain concerns about plaintiff's leadership. He gave plaintiff a satisfactory or better rating.

Plaintiff was not demoted. He lost no pay. There is no evidence he was denied a promotion. In fact he did not apply for one. The battalion chief testified that he "absolutely believes" that plaintiff has the chance to be promoted to battalion chief.

Plaintiff is still employed by the Los Angeles Fire Department and still "love[s] the fire department with all his heart." Nevertheless, after a few transient, unpleasant experiences, plaintiff sued for retaliation and recovered $3,750,000.

Evidence suggests that plaintiff is a well-qualified member of the Los Angeles Fire Department. But an impartial administrative process found that he performed deficiently on several occasions. Initial penalties were reduced and were minor. On another occasion, plaintiff was charged with misfeasance—essentially by omission—but the charges were dropped. The battalion chief noted some concerns with his leadership. That plaintiff may have been "a rising star" who "aspired to rise even higher" is not a guarantee to him that he will enjoy a tranquil climb to the top. Plaintiff has admirable goals and ambitions. But no one is preordained to realize his or her aspirations in this life.

Plaintiff complains that on one occasion he was denied time off. On another occasion he had to work beyond his scheduled shift during a major tanker fire incident. He challenges an above-average evaluation of him. Even though his interview was rated low, plaintiff declared, "I believe I gave a great interview." He expresses chagrin that he did not get a certain lateral assignment. In his case, plaintiff suggested that the captain who received the assignment was less qualified than plaintiff. He regrets that he did not receive the transfer to the fire station of his choice. He once complained about the way his crew had been treated.

No job is without some inconveniences and unpleasantness. I would categorize plaintiff's complaints as "[m]inor or relatively trivial adverse actions or conduct by [an employer] that, from an objective perspective, are reasonably likely to do no more than

anger or upset an employee, [that] cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable . . . ." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028. 1054.) This is "a case in which the plaintiff alleges merely commonplace indignities typical of the workplace." (*Id.* at p. 1060.) I would hold there is not sufficient evidence in the record to support a verdict in favor of a public servant, still on the job, for an award of $3,750,000.

There is no rhyme or reason to the damages. And the City of Los Angeles sufficiently raised the issue of excessive economic and noneconomic damages in its new trial motion. According to the City, "The total damage award was unconscionably excessive . . . and the jury awarded an excessive $960,000 for *future* non-economic damages without sufficient evidence to justify that award. . . . The total damage award of $3,750,000 was so excessive, in light of the evidence, as to shock the conscience." I too believe that "at first blush" the damages "shock the conscience" and suggests at least "passion" and "prejudice" on the part of the jury. (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 507.) Plaintiff's counsel argued that the noneconomic damages were intended to send the fire department a message. But that is not the purpose of noneconomic damages. Moreover, the economic damage award was based on a highly speculative theory of plaintiff's inevitable upward mobility.

The decision in this case, based on such a paucity of evidence, will not only cost the City a great deal of money and unjustly enrich plaintiff, but can have a chilling effect on management of an essential and highly disciplined public service agency. And what an incentive for other public employees to reach for the brass ring.

I would reverse the judgment.

MOSK, J.